Supreme Court, U.S.
FILED
961801 APR 23 1997.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DEBRA M. SMOLKO,

Petitioner,

v.

GTE SERVICE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court's June 28, 1996 order granting Defendant's motion to dismiss was in error, because the Defendant was properly served on January 17, 1996.

2. In the alternative, Plaintiff should have been allowed an extension of time so as to allow service that was effectuated on Appellee-Defendant on April 23, 1996, or allow Appellant-Plaintiff to serve Appellee-Defendant again under Federal Rule of Civil Procedure 4(m).

LIST OF PARTIES

The following individuals or entities may have an interest in the outcome of this Appeal:

Scott G. Blews, King & Spalding – Attorney of Appellees
Sharon Blair Enoch, formerly of Nimmons & Malchow – Attorney for Appellant
GTE Service Corporation – Appellee
Michael W. Johnston, King & Spalding – Attorney for Appellee
Leland M. Malchow, Nimmons & Malchow – Attorney for Appellant
Ken M. Nimmons, Nimmons & Malchow – Attorney for Appellant
Debra M. Smolko – Appellant

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OPINIONS BELOW

This is an appeal from an Eleventh Circuit decision. Smolko v. GTE Corp., No. 96-8897) (11th Cir. January 23, 1997) (App. 8-9), which Petition for Rehearing and Suggestion of Rehearing En Banc was denied on March 21, 1997 (App. 10-11). The District Court opinion is Smolko v. GTE Service Corp., No. CV 193-88 (S.D. Ga. Order June 28, 1996) (App. 1-7).

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on January 23, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fed. R. Civ. P. 4(m):

(m) TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

STATEMENT OF THE CASE

In an Order dated April 11, 1995, the District Court originally dismissed this case for failure to prosecute. (R3) In an Order dated May 3, 1995, the Georgia Supreme Court suspended the Plaintiff's original counsel from the practice of law until further notice. Said suspension was mailed to the Court in a letter dated July 25, 1995, and received by the United States District Court on July 31, 1995. (R4)

In an Order dated August 15, 1995, the Honorable Dudley H. Bowen, Jr. issued a Show Cause Order as to why said case should not be re-opened. (R5)

In response to said Order, Plaintiff mailed the Court a letter dated August 21, 1995, which was received on August 25, 1995. (R6) The Plaintiff outlined her attempts to retain another lawyer, as well as inform the Court of a serious automobile collision which occurred on June 25, 1995, in which she sustained major head, lung, neck and knee injuries. The Court re-opened Plaintiff's case subject to notification as to whether she is to proceed pro se or with an attorney. (R7) On October 25, 1995, Sharon Blair Enoch, formerly of Nimmons & Malchow, made a Notice of Appearance and filed a First Amended Complaint. (R8, R9)

On October 26, 1995, Plaintiff's counsel mailed the Amended Complaint along with a Notice of Lawsuit and Request for Waiver of Service, one original and one copy of the Waiver of Service of Summons, Plaintiff's Rule 26.3 Interrogatories, and Plaintiff's Interrogatories and Request for Production of Documents to GTE and Notice

of Case Management Procedures to the Defendant. The return of service was dated October 30, 1995.

Plaintiff contends that she personally served GTE through CT Corporate Systems with the Amended Complaint which contained a valid Summons which was attached as Exhibit "D" on January 17, 1996. The Defendant did not answer said Complaint within twenty (20) days of that service.

The Defendant filed a Motion to Reconsider, or in the Alternative, Motion to Dismiss. The Motion to Dismiss was granted by the District Court on June 28, 1996 (App. 1-7). The Eleventh Circuit affirmed the District Court on January 23, 1997 (App. 8-9).

REASONS FOR GRANTING THE WRIT

1.

The District Court Erred in Finding That the Defendant Was Not Properly Served With the Amended Complaint and Summons on January 17, 1996

In the present case, the original Summons, original Complaint, and Amended Complaint were served on the Defendant on January 17, 1996, and no answer has been filed by the Defendant within twenty (20) days of service as required under Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure. Rule 4(c)(1) states a Summons shall be served together with a copy of the Complaint. There is no requirement that a "separate" Summons be served as argued by Defendant, even though a separate Summons was served in this case. Furthermore, Plaintiff argues that the original Summons that was served as Exhibit "D" to

the Amended Complaint had not expired. Thus, the Defendant is in default since it did not answer within twenty (20) days of service of the Complaint, Amended Complaint and Summons that was served on January 17, 1996.

2.

The District Court Erred in Granting Defendant's Motion to Dismiss, and the United States Supreme Court Has a Chance to Interpret the New Federal Rule of Civil Procedure 4(m) for the First Time in This Case.

The Court erred in dismissing the case and not allowing Plaintiff-Appellant additional time to effect service. Rule 4(m) is an amendment of the old Rule 4(j). As the Advisory Committee notes indicate, the new rule "retains much of the language of the present subdivision (j)." See Federal Rules of Civil Procedure 4 Advisory Committee Notes to 1993 Amendments. There is, however, a substantial change as to what may happen if a plaintiff fails to meet the 120-day deadline. As in the past, the Court "shall dismiss the action without prejudice as to the defendant" unless the plaintiff "shows good cause for failure," the wording being close to, but not exactly the same as old Rule 4(j). The dismissal can also be made both "upon motion or on the Court's own initiative after notice to the plaintiff" as in the past. The change comes as to the allowance of additional time. The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days. It also "authorizes the court to relieve a plaintiff of the consequences of

application of this subdivision even if there is no good cause shown." *Id.*

The Advisory Committee notes go on at some length to comment on why a plaintiff might be relieved of the 120-day time limit in the absence of "good cause shown." According to the Committee, such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example if the applicable statute of limitations would be the re-filed action, or if the defendant is evading service or conceals a defect in attempted service. *Ditkof v. Owens-Illinois, Inc.*, 114 FRD 104 (E.D. Mich. 1987).

In *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995), the court held that even if the plaintiff fails to show good cause for its untimely service of summons so as to be entitled to a mandatory extension of time, the new Rule 4(m) requires the District Court to consider whether permissive extension of time may be warranted. Under Rule 4(m), the court may extend time even if good cause is not shown. *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3rd Cir. 1995).

In the present case, the statute of limitations would bar a re-filed action, and the Defendant has concealed the alleged defect in the attempted service on January 17, 1996. Those issues constitute "good cause" under the advisory notes to Rule 4(m). Thus, if the Court finds the Defendant was not properly served on January 17, 1996, the Plaintiff should be allowed an extension of time so as to allow the service that was effectuated on April 23, 1996 or allow Plaintiff to serve Defendant again.

CONCLUSION

For the reasons set forth above, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DEBRA M. SMOLKO,	*	
Plaintiff,	*	CIVIL ACTION NO.
	*	CV 193-88
v.	*	
	*	
GTE SERVICE CORP.	*	
Defendant.	*	

ORDER

(Filed June 28, 1996)

Before the Court in the above-captioned case is Defendant's Motion to Reconsider, or in the Alternative, Motion to Dismiss. The Motion to Dismiss the case in its entirety is **GRANTED** for reasons stated below.

Procedural Background

Plaintiff Debra Smolko filed this gender discrimination suit against Defendant GTE Service Corp. on May 27, 1993. A summons was issued by the clerk of court that same day. Pursuant to Federal Rule of Civil Procedure 4(j), the summons and complaint had to be served on

Defendant within 120 days of filing the complaint. Otherwise, in the absence of good cause, the action had to be dismissed without prejudice. Fed. R. Civ. P. 4(j).[1]

Plaintiff mailed the complaint and summons, together with a request for acknowledgement of mail service, to Defendant on September 24, 1993, the 120th day after filing the complaint. Defendant, of course, did not receive the request for acknowledgement of mail service until after the time for perfecting service had expired. Thus, Defendant did not acknowledge service by mail. Plaintiff took no further action. The case was dismissed on April 11, 1995, for failure to prosecute.

On July 31, 1995, Plaintiff sent a letter to the Court requesting that the case "be reopened due to legal misrepresentation." Plaintiff explained that her attorney, Lourdes Neely Coleman, had been suspended from practice on May 3, 1995, for failure to adequately respond to the Georgia State Bar's Notice of Investigation, which was apparently issued in response to a grievance filed by Plaintiff. Plaintiff was ordered to show cause why the

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[1] Rule 4(j) read in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Rule 4(j) was amended on December 1, 1993, and renumbered as Rule 4(m).

case should be reopened, "particularly in light of Plaintiff's 80-day delay in making her request."

On August 25, 1995, Plaintiff responded to the show cause order by letter, stating that she had been trying to obtain alternative legal counsel since Ms. Coleman's suspension, but her efforts were hampered because she did not live in Georgia and she had been in a serious car accident in June.

Given the serious nature of Plaintiff's problem with her legal counsel's representation in this case, I reopened the case on October 6, 1995.[2] Plaintiff filed an amended complaint on October 26, 1995, but a new summons was not issued. In December of 1995, Plaintiff mailed the amended complaint, with a request for waiver of service, to defendant. Defendant did not sign the waiver of service, as is its prerogative.

On January 17, 1996, Plaintiff personally served Defendant with a copy of the amended complaint, but did not serve a valid summons. Instead, Plaintiff attached a copy of the original summons issued on May 27, 1993 as an exhibit to the amended complaint. Plaintiff also served Defendant with another request for waiver of service of summons, which Defendant did not sign. Finally, on

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[2] Defendant has filed a Motion for Reconsideration, arguing that the Court improperly granted Plaintiff's Motion to Reopen the case under Fed. R. Civ. P. 60(b). Because I am granting Defendant's Motion to Dismiss, I need not reexamine the propriety of reopening the case on October 6, 1995. Accordingly, Defendant's Motion for Reconsideration is **DENIED AS MOOT.**

April 23, 1996, Plaintiff personally served a new summons (issued April 17, 1996) and the amended complaint of Defendant.

Before the Court is Defendant's Motion to Dismiss the Complaint for failure to perfect service of process.

Defendant's Motion to Dismiss

Defendant first contends this case should be dismissed for failure to serve the original complaint of May 27, 1993 in an effective and timely manner. Service should have been made 120 days after May 27, 1993. Fed. R. Civ. P. 4(j).

Indeed, service of the original complaint had not been perfected within 120 days of filing the complaint. The time for service expired on September 24, 1993. Plaintiff never attempted to personally serve Defendant within this 120-day period, and unacknowledged service by mail did not constitute perfected service. The case therefore was properly dismissed at the time.

Defendant points out that Plaintiff has never requested an extension of time for service and that the filing of an amended complaint does not automatically extend the time for service. Hence, Defendant asks this Court to dismiss the case once again for failure to perfect service of the original complaint by September 24, 1993. However, I essentially gave Plaintiff a second bite at the apple when the case was reopened. It would be paradoxical to dismiss this case once again for ineffective service of the original complaint when I have effectively excused

Plaintiff's lack of diligence in 1993 by reopening the case in 1995.

In any event, Defendant next argues correctly that the case should be dismissed because Plaintiff failed to effect valid service of the amended complaint. In December of 1995, Defendant received a request for waiver of service of the amended complaint, but declined to waive service. Plaintiff then attempted to personally serve Defendant in January of 1996, but she did not attach a valid summons. Plaintiff again requested Defendant to waive service of the summons at this time, but Defendant refused. The original summons issued on May 27, 1993 was attached to the amended complaint as an exhibit, but this summons had expired. *See generally* Wright & Miller, *Federal Practice and Procedure*, § 1085, at 23 (1987) ("The life of a summons, then, is 120 days."). Rule 4(c) clearly requires the service of the complaint and a valid summons. Therefore, the attempted service in January was improper.

Plaintiff finally perfected service on April 23, 1996, nearly six months after filing her amended complaint. Thus, service of process was not timely.

Fed. R. Civ. P. 4(m) governs the consequences of untimely service of the amended complaint. Rule 4(m) provides the following:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to Plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if

> the Plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Pursuant to this rule, the Court must allow additional time if the Plaintiff can demonstrate good cause. However, the rule also "authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown." Fed. R. Civ. P. 4(m), Adv. Comm. Notes.

Plaintiff has not set forth any reason to excuse the failure to timely serve the amended complaint. Certainly, Plaintiff cannot blame her inability to properly serve Defendant with the amended complaint until April of 1996 on her difficulties with her original attorney. Indeed, Plaintiff has been represented by counsel since the summer of 1995. Thus, Plaintiff cannot demonstrate good cause.

Plaintiff's responsive brief now seeks a belated extension of time to perfect service. There is no reason why such an extension should be granted when Plaintiff has been given every benefit of the doubt to this point and two opportunities to prosecute this action. The Federal Rules of Civil Procedure have been promulgated to govern and advance the respective positions of both parties to a civil action; Defendant is certainly entitled to expect any protection the rules offer it through a consistent and fair application of the rules. Accordingly, I find Plaintiff has failed to properly effect service of process of the amended complaint, and, in the absence of good cause, the case should be dismissed.

Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**. As stated previously, Defendant's Motion for Reconsideration is **DENIED AS MOOT.** Plaintiff's Motion for Oral Argument is also **DENIED AS MOOT.**

Because Plaintiff's Motion for Default Judgment rests on the erroneous premise that service of the amended complaint was properly effected in January of 1996, this motion is **DENIED.** Furthermore, Plaintiff's lack of diligence in prosecuting this case effectively precludes any recovery of costs incurred by Plaintiff in attempting to personally serve Defendant. Accordingly, Plaintiff's Motion for Imposition of Costs for Failure to Waive Service of Summons is **DENIED**

The clerk is instructed to close this case and enter final judgment for Defendant. Costs are taxed against Plaintiff.

ORDER ENTERED at Augusta, Georgia, this 28th day of June, 1996.

/s/ illegible
UNITED STATES
DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-8897
Non-Argument Calendar

D. C. Docket No. CV193-88

DEBRA M. SMOLKO,

Plaintiff-Appellant,

versus

GTE SERVICE CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(Filed January 23, 1997)

Before TJOFLAT, Circuit Judge, FAY and KRAVITCH*, Senior Circuit Judges.

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* Judge Kravitch was in regular active service when this matter was originally submitted, but has taken senior status effective January 1, 1997.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: January 23, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 4/2/97

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8897

DEBRA M. SMOLKO,

Plaintiff-Appellant,

versus

GTE SERVICE CORP,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia

(Filed Mar. 21, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion, 11th Cir., 19__, ___ F.2d ___.

Before: TJOFLAT, Circuit Judge, FAY and KRAVITCH*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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*Judge Kravitch was in regular active service when this matter was originally submitted, but has taken senior status effective January 1, 1997.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE